

The European Court of Justice has taken on huge new powers as 'enforcer' of last week's Treaty on Stability, Coordination and Governance. Yet its record as a judicial institution has been little scrutinized.

Mar 7 2012

*In the ongoing effort to staunch the Euro crisis, last Friday saw the signing of a stringent new fiscal compact to limit budget deficits and debt, by 25 EU member states. The European Court of Justice has taken on a new role to enforce these provisions by enacting severe penalties on non-compliant countries. **Damian Chalmers** argues that the Court's record has been very little scrutinized. In a second part of his case tomorrow, he argues that ECJ is too institutionally enmeshed with European Union policy-making in general. It cannot now serve its original purpose, and we should examine what alternative options exist.*



Until now the European Court of Justice (ECJ) has been the institutional expression of Europe's political morality. It has recently acquired a new role under the **Treaty on Stability, Coordination and Governance**, signed last Friday by twenty five member states. Now the ECJ is to become an active agent of executive government through enforcing the 'fiscal compact' section of the Treaty – under which member states commit themselves to a balanced budget. The new requirements entail that states with a total debt exceeding over 60 per cent of their GDP must run a structural deficit of no greater than 0.5 per cent of GDP. (Member states with a lower debt/GDP ratio can run up only somewhat less restrictive deficits, of up to 1 per cent of GDP).

It is difficult to over-dramatise the consequences of the new compact for economic policy-making. In the noughties, when growth was good and capital cheap, the Euro area states ran a structural deficit on average four and a half times greater than the 0.5 per cent level. Since the financial crisis began in 2008, national debt repayments have increased, access to capital via bond markets has become more expensive, and the majority of EU States are now under legal obligations to reduce their debt to 60 per cent of GDP. On average this will mean Euro area states reducing their total debt by just under one third. Europe's citizens will be paying a lot more taxes for a lot less welfare.

It might be thought that if national politicians decide to entrench a certain economic policy making model, it is ultimately their prerogative. They are accountable for that choice in both domestic and Union elections. Electorates can kick them out, if they wish, and bring in politicians who will change the policies. However, whilst it will still be possible to give the politicians a good kicking, it will only be that: an exercise in political sadism which will probably be enjoyable, certainly fetishistic, but ultimately only empty. For this is where the Court of Justice comes in. It is there to ensure that the policies cannot be changed whilst the Union lasts in the current format.

Policing the constitutional retrenchment of public finances is an unusual role for a court. However, in the ECJ's case it is not a one-off role, and the new task is symptomatic of the Court moving increasingly to centre stage in fiscal and welfare policy-making within the European Union.

The new reforms widen the range of state behaviors for which the Court may levy eye-watering fines on member states. These include

- running a budget deficit of more than 3 per cent of GDP;
- failing to bring total government debt down to the 60 per cent threshold sufficiently quickly;

- running 'excessive macro-economic imbalances';
- significantly deviating from the medium-term budgetary objectives agreed with the other member states; and
- providing inaccurate statistical information to the EU institutions (such as the European Commission of Eurostat).

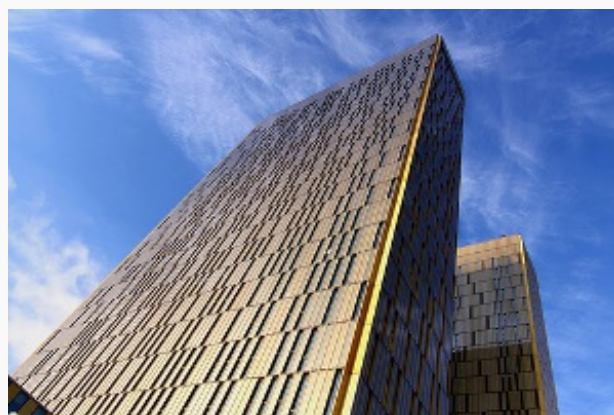
These new, binding provisions are to be introduced by each of the 25 signatory member states into their national law within one year of the Treaty coming into force, and the new law should be permanent and preferably constitutional. If states fail to take these steps the European Commission is required to take them before the Court of Justice, who can issue a judgment requiring the State to take the necessary measures. If the member state in question does not comply with the ECJ verdict, they can then be brought back before the Court to be fined up to 0.1 per cent of GDP. Although not stated explicitly in the Treaty, it looks as if this fining process could be endlessly repeated until the country does comply. (This is the normal way in which the ECJ operates to secure compliance).

Thus last week's new compact means that changes that will ultimately transform the social contract between states and their citizens are to be railroaded through by the Commission officials and the Court of Justice judges ensuring that there is not the slightest expression of democratic deviation.

Once these changes have been instituted, a double bind is then introduced. Unilateral constitutional amendment during the life of this Treaty is prevented by its terms – so a country cannot singly alter its commitment. Amendment at a pan-Union level will prove difficult, because it will require that all the States concerned obtain the super-majorities domestically necessary to amend their constitutions. Suppose that one state in the Euro zone fails in its own legislature to achieve this threshold for the pan-Union change – then there is little reason for it to allow other states to depart from the current Treaty. Otherwise, the state draws the 'dummy' card of continuing to accept the full costs of fiscal rectitude while its partners enjoy more relaxed rules. Through currency and possible fiscal transfers, the dummy state would then become subject to the fiscal irresponsibilities of those who have abandoned the previous rules.

The Court's record as a judicial institution

What can we say about the European Court of Justice, the institution that will now be sitting at the centre of this unprecedented transnational experiment? Is the fact that ECJ has acquired this dramatic new role indicative of its high institutional standing and tremendous existing success? Or has ECJ acquired additional responsibilities chiefly because (alone amongst EU institutions) it has so far escaped the level of critical scrutiny and exposure to public gaze to which other parts of the EU have been subjected? In the rest of this blog, and in my follow-on blog tomorrow, I want to argue the latter case strongly. I suggest that scrutiny of the ECJ needs to be greatly increased, and specifically we should be concerned with how to *reduce* its role rather than how to augment it. To start with here I briefly review the Court's record.



European Court of Justice, Luxembourg Credit: Gwenael Piaser (Creative Commons BY-NC-SA)

In its sixty year history (dating back to the very earliest days of the European Economic Community, the EEC, predecessor of the EU) the European Court of Justice has been subject to institutional review only twice. In both cases, these reviews could not be said to be fully independent, insofar as they were done by former Presidents of the Court itself. The first review was the Due Report in 2000 for the Treaty of Nice, which proposed modest reforms to the Court of Justice. These Due report suggestions were ignored in the Court's own submission to the Inter-Governmental Conference and

all of them were rejected at the Treaty of Nice.

The second occasion when ECJ was reviewed was the Discussion Circle led by Gil Rodriguez Iglesias at the Future of Europe Convention in 2003. The choice made to have a Discussion Circle (rather than the more ambitious Working Party process used with other significant Treaty matters) foreclosed the range of debate that might have taken place at the Convention.

The Court itself is composed of 27 judges, one from each member state. Only ten of the current judges (that's 37 per cent) have served in a domestic appellate court or above within their member state. To their credit, eight of the experienced ten come from the A-12 countries (the 12 newest member states who joined since 2004). The other two experienced judges come from two of the pre 2004 (or EU-15) states, the United Kingdom and France.

Because the Court decides almost all matters that come before it in 'Chambers', each of which has three or five judges, it is worth noting that the dispersion of the experienced judges between Chambers varies greatly. There are two Chambers, the First and Fifth, where only one of the judges currently sitting has domestic appellate experience. So in these Chambers, cases are essentially being decided by people with no significant prior experience of judging before they joined the ECJ.



Justices in the Grand Chamber of the European Court of Justice Credit: TPCOM (Creative Commons BY-NC)

Nor is the separation of powers between the Court and other arms of government so clear. In November 2011 it was widely reported that the principal alternative to Lucas Papademos for the post of Greek Prime Minister was the current President of the Court, Vassilis Skouris.

In terms of its outputs, in the last year the Court has

- made it impossible for most forms of stem cell research to take place
- prevented general restrictions being imposed on secretive processing of data without the subject's consent.

By contrast, the Court has expressly indicated that it is perfectly acceptable

- for individuals to have their fundamental rights violated within EU member states;
- for the EU to breach customary international law; and
- for individuals to be stopped moving from State to State because they have not paid their taxes.

The ECJ's dialogue with constitutional courts is much vaunted in the literature about it, but again in the last two years its central interventions have been:

- to refuse to take submissions from one country's constitutional court and
- to deny the French Constitutional Council its traditional role of assessing whether French laws violate the French Constitution, if such an assessment in any way touches upon EU law.

It might be argued that all the Court needs to become a better judicial institution is simply a change of personnel. However, it is not just the style of the Court of Justice's interventions which is problematic – it is also their scale. In February 2012, a relatively uncontroversial month by ECJ standards, the Court gave significant judgments

- on VAT law;
- gambling law;
- environmental law;
- the ownership of cinematographic works, and
- the duties of Internet Service Providers to filter information.

This all begs the question as to whether the Court brings sufficient benefits to be worth all this, a subject continued in my next blog tomorrow.

Please read our comments policy before commenting.

About the author

Damian Chalmers – *European Institute and Department of Law, LSE.*

Damian Chalmers is Professor of European Union Law at the London School of Economics and Political Science. He is also a Jean Monnet Chair and editor of the *European Law Review* and *EU Jurist*. He has held visiting posts at the College of Europe, Instituto de Empresa and the National University of Singapore. His most recent book (with Gareth Davies, and Giorgio Monti) is, *European Union Law: cases and materials* (Cambridge University Press, 2010).



No related posts.